EC

INTERSTATE COMMERCE COMMISSION

DECISION

SERVICE DATE
AUG 23 1985

SPECIAL TARIFF AUTHORITY NO. 85-1310

DISCOUNT COUPONS

Decided: July 30, 1985

ABF Freight System, Inc., requests authority, by its application No. 85-1, to depart from the terms of 49 CFR 1310 to file its Tariff ICC ABFS 6000

The primary issue to be considered is that the discounts to be deducted from freight charges will not be specifically published in the tariff. We only know that no discount will exceed 50 percent.

We do not know what method will be used to distribute the coupons, only that ABF will make the coupons available upon request of a shipper or receiver. We do not know whether the coupons distributed at a given terminal will contain the same or varying discounts.

In the absence of information in the application to the contrary, it is a good possibility that the discount to be applied (as well as the coupon to be distributed in a given situation) is open to negotiation based on what the traffic will bear and the degree of the carrier's need for additional tonnage. Perhaps the first shippers contacted would receive a larger discount than the later ones.

Even if a coupon were distributed to a shipper, the carrier could negate any discount by applying one of the exceptions in the tariff. For example, if a shipment is transported in equipment not owned by ABF (presumably by an owner-operator), the discount offered on the coupon would not apply.

It would seem that a knowledgeable shipper could attempt to negotiate and demand the maximum 50 percent discount. However, under the terms of the tariff, the carrier could refuse to issue a 50 percent coupon.

The proposal more closely resembles an open ended contract than workable common carrier tariff provisions.

Section 10761(a) of the Interstate Commerce Act (49 U.S.C. 10761(a)) requires that the rate for transportation or service be contained in a tariff

The proposal goes beyond anything that this Commission has, thus far, approved.

The proposition considered by the Commission in Special Tariff Authority No. 84-04859, <u>Average Rates</u>, represents the most liberal interpretation of the explicit-statement-of-rates requirement that the Commission has sanctioned. [redacted]

Also, in Special Tartiff Authority No. 85-1852, Excess Capacity Rates, American Freight System, Inc., a majority of the Commission denied a proposal designed to diminish excess capacity (Vice Chairman Gradison and Commissioner Andre voted to grant). American Freight System sought authority to file a tariff that would contain 99 rates ranging from 50 cents through 375 cents per loaded vehicle mile. Any one of the 99 rates could be offered to the consignor when the carrier has been offered or has located a volume or truckload shipment that would utilize excess capacity. Once a shipment was accepted under the plan, a control number would be issued and entered on the Bill of Lading. The last two digits would identify the paragraph in the tariff containing the agreed upon rate. The tariff contained no formula or method for the tariff user to determine the rate that would apply on a given shipment. The ABF proposal is therefore similar in many respects to the American Freight System one.

Rates become effective and are canceled on a date. Under the proposal, questions could arise as to when a particular discount would become applicable, i.e., when the coupon is issued, when the coupon is attached to the bill of lading by the shipper, when the proposal is published. When would the applicability end? In the event of an investigation, formal case or Court action, the verification of pricing information could be very difficult, if not impossible, during a particular time frame. Since a given rate would be made applicable by use of a coupon, it could be argued that rates were being changed without public notice.

This Commission is aware of the intense pressures of market-place pricing, the need to react swiftly to survive in a competitive environment, the need to load empty equipment and the exigencies of the changing ecomony. And the Commission understands the position of the applicant. But there are other ways for the applicant to accomplish its purpose.

There are many innovative tariffs on file. Some publish percentage discounts applicable only on specific movements or shippers. Others go the conventional route and file a one-page tariff amendment upon one day's notice to reflect the reduced rate in a given traffic lane for one or more shippers. All appear to satisify the carriers' and shippers needs.

The Commission authorized the filing of reduced rates upon one day's notice in Ex Parte No. MC-170, Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates. There, the Commission seemed to be considering the very problems facing the applicant when it stated the following in connection with short notice:

Common carriers would have increased flexibility to implement marketing strategies and to respond to competition initiatives by other common carriers. A reduction in notice requirements would also assist common carriers to respond better to competition with motor contract carriers (recently freed from the tariff filing requirements) and rail carriers (particularly on deregulated trailer-on-flatcar (TOFC) and container-on flatcar (COFC) service), and in attracting traffic from private carriage.

Since rates resulting in reductions can be filed upon one day's notice, tariffs can be sent all the way from the West Coast to the Commission in less than 8 hours, rates can be restricted to specific shippers or traffic lanes, and many kinds of innovative plans that provide specific and definite prices can be filed, there is no necessity for a carrier to file an indefinite plan such as proposed here.

Insofar as the Roadway tariffs are concerned, they do contain "write-in" provisions and ranges of discounts as stated by ABF. However, all these rates, discounts and provisions are specifically stated in the tariff. Roadway's range of discounts increase according to volume shipped by the customer, which are specifically stated.

We have considered all matters of record in this proceeding and will deny the application. In our administration of the amended Interstate Commerce Act, it is our purpose to promote carrier competition and to encourage innovative pricing methods. However, on the basis of the record, we conclude that the tariff at issue does not meet the minimum technical requirements of the statutes.

It is ordered:

The application is denied.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett, Andre, Simmons, Lamboley and Strenio. Commissioners Lamboley and Strenio dissented with separate expressions. Commissioner Andre would have granted the application.

(SEAL)

James H. Bayne
Secretary

<u>COMMISSIONER LAMBOLEY</u>, dissenting:

In my opinion, the request for special tariff authority may be properly granted.

The proposed tariff would provide promotional discounts at the carrier's newly-opened terminals. Thus, it is limited as to both time and place. Moreover the fact that the promotional offer is made to the general shipping public should militate against unlawfully discriminatory use of the discounts.

COMMISSIONER STRENIO, dissenting:

This discount coupon proposal appears to differ little from the "get-acquainted offers" or "introductory discounts" quite commonly used in other industries for promotional pricing purposes. Such discounts are inducements to get customers to try a firm's product or service and have proved to be an effective marketing technique where, as here, a new entrant is attempting to establish a customer base. Clearly, promotional pricing that facilitates effective competition by new entrants is consistent with the pro-competitive thrust of the Motor Carrier Act of 1980. Furthermore, because the coupons are of limited scope and duration, and are being offered in a competitive environment, no meaningful concern has been presented here regarding the issue of discriminatory application of the introductory discounts.

The question as to whether the discount coupon proposal meets technical tariff filing requirements entails a close call. I think, however, that because of its special characterstics the proposal is consistent with the intent of the tariff filing requirements, and it is clearly in the public interest. Therefore, I would have approved the special tariff authority application.

APPENDIX B

INTERSTATE COMMERCE COMMI

DECISION

No. MC-C-10975[1]

ROADWAY EXPRESS, INC.

v.

calendar [illegible]. This is basically the same provision that was set forth in [illegible] 175 of Tariff [illegible].

of the administrative process. It argues that Tariff 401 does not contain the "backhaul" and "imbalance" provisions of Tariff 400 that were found objectionable in the December decision. In addition, it maintains that Tariff 401 modifies the shipper participation conditions of Tariff 400 in several respects. Consolidated also contends that, under 49 U.S.C. 10708, the Commission is required to conduct an investigation and full hearing as to the lawfulness of Tariff 401 before it may be canceled.

In its statement submitted in response to the July decision, Consolidated points out that Tariff 401 sets forth the maximum and minimum applicable rates with certainty. It argues that, under the tariff, a shipper can ascertain what the highest rate applicable to a particular movement may be, and a competing carrier can calculate the lowest rate for that movement.

Consolidated further contends that its Tariffs 400 and 401 are not different from many other "trigger" tariffs that the Commission has accepted and currently are on file. If its tariffs were unlawful, it maintains, so are the similarly worded tariffs of other general commodities motor carriers. In the event the Commission doubts the validity of these "trigger" tariffs, Consolidated contends that the Commission should institute an investigation of all such tariffs or enlarge the scope of its investigation of household goods carriers' discount tariffs begun in No. MC-C-30029, Andrews Van Lines, Inc., et al. - Petition for Declaratory Order (not printed), served July 20, 1987, so as to include the "trigger" tariffs of general commodities motor carriers.

Roadway argues in reply that Tariff 401, while not verbatim of Tariff 400, is similar in major respects, is equally vague and indefinite, leaves each specific rate open for negotiation for each specific movement, and is spot rating which is unlawful under 49 U.S.C. 10761. Roadway further contends that Consolidated's attempt to justify Tariff 401 by comparing it to provisions in other carriers' tariffs is not valid because the others are discount rates provisions that set forth specific percentages from specifically published rates.

DISCUSSION AND CONCLUSIONS

We conclude that Tariff 401 is not materially different from Tariff 400, does not meet the requirements of 49 U.S.C. 10761(a) and 10762(a)(1), and should be ordered canceled.

As fully discussed in our December decision, a tariff is required to disclose the rates applicable to the transportation performed for a shipper, or set forth the method for calculating the charges. A tariff is not acceptable unless it allows competing carriers to know the applicable rate or how a per-unit rate is determined, and allows shippers to compute the precise per-unit rates to which they are entitled. See Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) (RCCC); Special Tariff Authority No. 85-2375, Nedded Transportation (not printed), served October 31, 1985 (Nedded); and No. 40181, Capitol Bus Company - Order to Strike Tariff (not printed), served September 23, 1987.

A comparison of Tariffs [illegible] and [illegible]

[illegible]

forth specific percentage discounts from specifically published rates. Accordingly, we do not think that an investigation of these other tariffs or a broadening of the Andrews Van Lines declaratory order proceeding is warranted. Furthermore, consideration of the legality of such tariffs can best be considered in individual complaint proceedings, and Consolidated is free to bring them as Roadway did.

Consolidated contends that an investigation and full hearing as to the lawfulness of Tariff 401 is required before it may be canceled. Consolidated has been afforded that full hearing here and has had the opportunity to justify Tariff 401. It has not done so.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Consolidated Freightways Corporation of Delaware is directed to cancel Tariff ICC CFWY 401 filed with the Commission on December 19, 1986.

2. This decision will be effective 30 days from its date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley commented with a separate expression. Chairman Gradison concurred with a commenting separate expression. Commissioner Andre dissented with a separate expression.

Noreta R. McGee
Secretary

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VICE CHAIRMAN LAMBOLEY, commenting:

I would institute an investigation into the lawfulness of all such "trigger" tariffs. As pointed out by Consolidated, Tariffs 400 and 401 are not substantially different from other similar tariffs on file at the Commission, including that of Roadway.

...al Hearing ...

Regional Office(s) served: [X] 1 [X] 2 [X] 3 [ ] ...

I certify that on the Service Date noted above, a copy o...

[X] Entire Commission	[ ] Division	[ ] ...
[ ] Employee Board	[ ] Director	[ ] ...
[ ] Unopposed Notice (UN)	[ ] Modified Procedure Order (MP)	
[ ] Certificate, License, or Permit		[ ] ...

decision/notice was served on the individuals named below...

Service Clerk ____ Date ____

Individuals Ser...

MCC010975/000... 76761 SCSS POR
CONSOLIDATED FREIGHTWAYS CORP. OF DEL.
P. O. BOX 3062
PORTLAND OR 97208

APPENDIX C

SPECIAL TARIFF AUTHORITY NO. 85-2375

HADDAD TRANSPORTATION

Appendix [illegible]
Page 1 [illegible]

Decided September 19, 1985

Haddad Transportation, Inc. (Haddad), has filed an application [illegible] authority to depart from the terms of 49 CFR 1312.13(j) and 1312.14[illegible] file its Tariff ICC HADI 500 with this Commission. The application [illegible] by the Regular Common Carrier Conference (RCCC), and Haddad replied.[illegible]

Haddad has requested special permission because the tariff [illegible] for discounts up to 10 percent by the use of customer account [illegible] would contain no formula or other method that could be used to [illegible] of the discounts, if any, would apply on a particular shipment, [illegible] shipper and carrier would know the percent discount that was [illegible]

POSITION OF PARTIES

Haddad states that the proposal is competitively necessary [illegible] motor carrier marketplace, because it would allow spot-[illegible] based on differences in competitive and operating circumst[illegible] each individual shipment. It argues that all like shipments [illegible] in all respects due to "value of service" and "value of [illegible]" considerations and should not be subject to the same rates.

Haddad argues that variances occur in the marketplace [illegible] must be situationally priced on a shipment-by-shipment basis. It [illegible] only way it can respond to the marketplace in a practical and [illegible] to obtain greater flexibility to price in accordance with particular [illegible] circumstances and conditions as of a particular point in time.

1/ Haddad also moved to strike portions of the RCCC's protest. We will [illegible] this as the statements are mere argument.

2/ Upon request, a customer would be assigned a series of eleven [illegible] numbers. Each account number would consist of two digits, a hyphen, [illegible] five additional digits. The two digits preceding the hyphen would be [illegible] numbered 00 through 10 and would be different for each of the eleven [illegible] account numbers. These digits would be the same for all customers and would be reflected in the tariff. The five digits following the hyphen would be unique for each customer and would be the same for all eleven account numbers for that customer. As to a given shipment, a seven digit account number annotated on the bill of lading would entitle the shipper to the percent discount that equates to the first two digits of the account number.

The petitioner acknowledges that it has considerable flexibility under existing statutes. For instance, 49 CFR 1312.39(h) authorizes the filing of reduced rates upon one day's notice. Haddad argues, however, that since this requires the physical printing and filing of a tariff page, the procedure is both inefficient and uneconomical.

Haddad also notes that it believes that it already has the ability to perform transportation service with spot rate negotiations through its authority to provide contract carriage of general commodities on behalf of SS Brokerage, Inc., a 100%-affiliated motor carrier broker, and by the furnishing of equipment and drivers to shippers under lease arrangements.

The petitioner argues that the Commission has approved many kinds of publications that do not allow accurate determination from the tariff alone of the exact rate applicable on a given shipment. For instance, Haddad believes that its tariff plan is similar to a tariff publication of Aero Mayflower Transit Company, Inc., a household goods carrier, which was recently filed with the Commission. Therefore, it states that the question of conformity with the requirements of 49 U.S.C. 10761 and 10762 has already been addressed and found not to preclude tariffs of the kind proposed when the Aero Mayflower publication was accepted. 3/

In opposition, RCCC contends that the proposal is inconsistent with 49 U.S.C. 10761 and 10762, which require that the actual rates be set forth in a tariff on file with the Commission and be ascertainable. It further contends that the proposal is also inconsistent with Commission case precedents and regulations, and that, as recognized by Haddad, reasonable, flexible and lawful alternatives are available.

RCCC argues that, while Haddad would have a tariff on file, the rate in [illegible]

CONCLUSIONS

We will deny the application. The proposed tariff does not comply with the minimum requirements of the statutes. We conclude that the "paper audit trail of information" needed to determine the applicable discount, is not a legal substitute for lawfully filed tariff provisions, and does not meet the requirements of the statutes.

Section 10761(a) of the Act requires that the rate for transportation or services be contained in a tariff that is in effect, and that compensation be collected only on the basis of that rate for that transportation or service. Section 10762(a)(1) requires a motor carrier to publish and file with the Commission tariffs containing the rates for transportation.

Although the petitioner places substantial emphasis on the Aero Mayflower plan as justification for granting its proposal, this reliance is without foundation as this Commission has never formally ruled on the legality of the Aero Mayflower tariff. The tariff was merely accepted for filing at the staff level, and the issue of its legality has not been raised before the Commission.

The Haddad proposal goes beyond anything that this Commission may statutorily approve. For instance, the proposition considered by this Commission in Special Tariff Authority No. 84-04659, Average Rates, there a formula for determination of the rate. In the decision dated February 2[illegible], 1985, in No. 39928, Freight Forwarder Tariff Bureau, Inc., Average Rates - Petition to Reject, the Commission stated:

> ...[T]here is a clearly published set of base rates, from which the actual charges can be derived. In other words, the charges are tied

... [illegible] Filing Requirements for Independently Filed Motor Carrier and [illegible] Rates, which authorized the filing of reduced rates upon one [illegible] notice.

[illegible] rate reductions can be filed upon one day's notice, [illegible] sent from the West Coast to the Commission in less than eight hours [illegible] be restricted to specific shippers or traffic lanes, and many [illegible] plans that provide specific and definite prices can be [illegible] arguments [illegible] of its proposal are not persuasive, [illegible] of the [illegible] restrictions.

[illegible] request for the institution of investigations of all [illegible] pricing practices of the motor carrier industry and of the [illegible] of Hauling concerned, we conclude that the record in this proceeding does not justify the institution of any investigation.

This decision will not significantly affect the quality of the human environment or conservation of energy resources.

It is ordered:

The application is denied.

The request for institution of investigations and the request to strike the comments of the PCCC insofar as such comments apply to the Barrett Transportation Newsletter, are denied.

By the Commission, Chairman [illegible], Vice Chairman Gradison, Commissioners Sterrett, Andre, [illegible], Lamboley, and Strenio. Vice Chairman Gradison and Commissioners Andre and Strenio dissented with separate expressions.

James H. Bayne
Secretary

(SEAL)

COMMISSIONER ANDRE, dissenting:

The Interstate Commerce Act states that a rate for transportation must be contained in a tariff, expressed in money of the United States. Suppose a carrier publishes a whole myriad of tariffs explicitly setting out the rates for its services in form and manner that is beyond reproach. Suppose further that the same carrier also publishes one additional tariff that permits the shipper and the carrier to select the applicable rate from the first group, and then negotiate one of ten small discounts that are contained in the provisions of this final tariff. Have they arrived at a rate contained in a tariff and expressed in money of the United States? Is the answer to that question affected by the fact that the Interstate Commerce Act also states that the Commission has the power to prescribe the form and manner in which tariffs are to be filed?

There can be different views on these questions, no doubt. Because the statute governing motor carriage is pro-competitive in its mandate, and, as a unanimous Commission has advised Congress that economic regulation of motor carriage is no more than paper shuffling, a vote to permit such a discount